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No. 74-1293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

THE CITY OF BLACK JACK
a Municipal Corporation,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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The brief filed by the respondent in opposition to the petition so seriously misstates both the record and the opinion of the court below as to warrant a brief response.

1. The brief in opposition asserts, on several occasions, that the decision can be sustained because of the "clear and sufficient evidence" of a *purpose* to discriminate. See pages 5, 6, 8. In fact, the District Court found precisely the opposite to be true: "The evidence in this case does not support a charge of racial motivation, purpose, or intent in the incorporation of Black Jack as a city or the passing of Black Jack's zoning ordinance." Pet. App. p. A-19. The court below did not set that finding aside; it stated, expressly, that it deemed "purpose" to be irrelevant. Pet. App. A-31 n.3.[1]

Respondent cannot properly assert, therefore, that the decision in this case can be distinguished from the conflicting decisions in *Ybarra* v. *City of Town of Los Altos Hills,* 503 F.2d 250 (9th Cir. 1974) and *Mahaley* v. *Cuyahoga Metropolitan Housing Authority,* 500 F.2d 1087 (6th Cir. 1974), *cert. denied,* 419 U.S. 1108 (Pet. pp. 15-17), on the ground that "Those cases, however, did not involve a racially discriminatory purpose for the exclusion . . . ." Br. in Opp. p. 8. Nor can it properly assert that a decision, in which "purpose" is expressly held to be irrelevant, does not decide an important question of federal law that has not been but should be settled by this Court. Pet., pp. 9-12.

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[1] Respondent also seems to suggest (p. 6, n. 3) that the parties stipulated to "a prior pattern of discrimination" *by Black Jack.* On the contrary, the stipulation (Pet. App. A-13, par. 30) related to the facts recited in the District Court's findings 25-29 (*id.* pp. 11-13) relating to the entire St. Louis metropolitan area, and to a period prior to the incorporation of petitioner and the passage of its zoning ordinance. There is no finding, and no basis in the record for a finding, of any prior pattern of discrimination by petitioner.

2. The brief in opposition also asserts (pp. 6-7) that petitioner is in error in asserting (pp. 12-14) that the court below imposed a strict compelling-governmental-interest standard of review in testing the validity of the zoning ordinance. The court below was not in the least ambiguous; it said (Pet. App. A-32 n.4):

> "Even though this case is based on a federal statute, rather than on the Fourteenth Amendment, we believe that, once the United States established a prima facie case of racial discrimination, it became proper to apply the compelling governmental interest requirement of the equal protection cases."

The apparent conflict of that basis for decision with the decisions of this Court and of other courts of appeal noted in the petition (pp. 12-14, 16 n.9) cannot, therefore, be dismissed, as respondents would have it (p. 7) as "of merely academic interest."[2]

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[2] In addition, contrary to the suggestion of the brief in opposition (p. 7), the compelling interest test has *not* previously been applied in testing the validity of discrimination under Title VIII in United Farmworkers v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974), and Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010. In United Farmworkers, the court specifically pointed out that it did "not reach the question of whether the city officials' conduct . . . constituted a violation of the Fair Housing Act, 42 U.S.C. § 3601 et seq.," 493 F.2d at 811 n. 12; rather, the case was decided under the Fourteenth Amendment and it was in this context that the court addressed the compelling interest test. Likewise, the court's reference to the compelling interest test in Kennedy Park arose in the context of its discussion of the unconstitutionality of certain discrimination under the Fourteenth Amendment, 436 F.2d at 114; no reference was made to Title VIII in the court's discussion.

CONCLUSION

The decision below, as the petition states (p. 18) has departed from principles established by this Court, has reached a result which is contrary to that reached in other circuits, and has cast doubt on the validity of a vast array of local zoning ordinances. Its significance, and the need for its review—and reversal—by this Court should not be obscured by representing it as something it is not. Indeed, the effort of respondent to oppose its review on this ground serves only to underscore the need for its examination by this Court.

Respectfully submitted,

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